IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-719

BRADLEY LUMBER COMPANY, INC., *Petitioner,*

v.

ALICE K. SHARPE, *Respondent,*

AND

BRADLEY LUMBER COMPANY, INC., *Petitioner,*

v.

JUANITA SHARPE, By Her Next Friend,
H. L. King, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Did not the Court of Appeals correctly conclude as a matter of law from uncontradicted evidence that agency existed between the defendant driver Lewis and defendant Bradley Lumber Company as to the undisputed negligence of Lewis which brought injury and deaths to the Sharpe Family.

STATEMENT

Plaintiffs brought these suits under diversity of citizenship seeking recovery for permanent injuries, pain and suffering, and medical expenses incurred as a result of an automobile accident on November 26, 1966. Defendants were Leonard Lewis, the driver; R. K. Grindstaff & Son, a partnership, owner of the tractor-trailer; and Bradley Lumber Company, a corporation. The complaint averred that Lewis was the agent of both Grindstaff and Bradley. The District Court entered judgment of damages against Lewis and the partnership, but concluded as a matter of law that Lewis was not the agent nor an employee of the corporation, Bradley. On an appeal based solely on the agency question the Court of Appeals reversed, concluding that agency did exist as to the Bradley corporation and that the negligence of Lewis was imputed to Bradley also.

The negligence of Lewis is clear, as is the fact that such negligence destroyed a family unit. Neither the facts of the accident nor the *facts* of Lewis' status with regard to Bradley are disputed. The point of disagreement has to do with the conclusion arrived at from those facts. The District Court *concluded* that "there was no agency relationship either between Lewis and Bradley Lumber Company, Inc., or between the Grindstaffs and Bradley Lumber Company, Inc." (A-19) The Court of Appeals, in reversing, stated that "the conclusion is inescapable that a principal-agent relation was present." (A-6) Bradley maintains in its petition that the Court of Appeals improperly set aside findings of the District Court and substituted its own findings of *fact*. Actually, the Court of Appeals corrected, very properly, the *conclusion* reached by the District Court from the uncontradicted facts.

But the opinion of the Court of Appeals shows clearly that the uncontradicted facts compelled the conclusion of

law that agency *did* exist. It made no change in the District Court's findings of fact. Indeed the Court of Appeals used the findings of fact to reach the correct conclusion of law.

The District Court stated in its opinion: "During the trial, evidence unfolded a rather unique business arrangement between Lewis, the Grindstaffs, and Bradley Lumber Company, Inc." (A-14) The District Court resolved this "unique business arrangement" by *concluding* that there was no agency relationship either between Lewis and Bradley or between the Grindstaffs and Bradley and that Lewis' negligence was not imputed to Bradley. (A-19) In so doing, it erred.

What do the uncontradicted facts as found by the District Court *and* the Court of Appeals show?

a) Lewis received all of his compensation from Bradley (District Court Opinion, A-15; Court of Appeals Opinion, A-4); and

b) Lewis was paid by checks drawn by Bradley (District Court Opinion, A-15; Court of Appeals Opinion, A-4); and

c) Lewis participated as an employee of Bradley in its group health and life insurance (District Court Opinion, A-15; Court of Appeals Opinion, A-4); and

d) Lewis was carried on Bradley's payroll (District Court Opinion, A-15, 16; Court of Appeals Opinion, A-4); and

e) Lewis was claimed by Bradley as its employee for federal and state income tax purposes (District Court Opinion, A-16; Court of Appeals Opinion, A-4); and

f) Lewis was reported by Bradley as its employee for Workmen's Compensation purposes (District Court Opinion, A-16; Court of Appeals Opinion, A-5); and

g) Bradley reported Lewis as its employee to the Social Security Administration and for unemployment compensation purposes (Court of Appeals Opinion, A-4); and

h) Lewis reported Bradley Lumber Company as his employer in his state and federal income tax returns (Court of Appeals Opinion, A-5); and

i) Ronnie Grindstaff was one of three incorporators of Bradley Lumber Company, Inc., a director, and vice-president (District Court Opinion, A-14; Court of Appeals Opinion, A-5); and

j) Weekly, Ronnie received a check for $80.00 drawn on Bradley Lumber Company, Inc. (District Court Opinion, A-15; Court of Appeals Opinion, A-5); and

k) Ronnie participated as an employee of Bradley in its group health and life insurance (District Court Opinion, A-15); and

l) Ronnie appeared on Bradley's payroll (District Court Opinion, A-15, 16; Court of Appeals Opinion, A-5); and

m) Ronnie was claimed by Bradley as its employee for federal and state income tax purposes (District Court Opinion, A-16; Court of Appeals Opinion, A-5); and

n) Ronnie was reported by Bradley as its employee for Workmen's Compensation purposes (District Court Opinion, A-16); and

o) Ronnie reported daily at Bradley Lumber Company's yard in Marion, where he would receive the trucking orders to be relayed to Lewis for delivery (Court of Appeals Opinion, A-5); and

p) The truck driven by Lewis was garaged at Bradley's place of business in Marion, North Carolina (Court of Appeals Opinion, A-4); and

q) Ronnie Grindstaff's weekly payment of $80.00 from Bradley Lumber Company was not reported as Grindstaff partnership income (Court of Appeals Opinion, A-5); and

r) It was Bradley's lumber that Lewis had hauled to Lexington, North Carolina on the morning of the wreck (District Court Opinion, A-14; Court of Appeals Opinion, A-4).

Not a single one of these facts is contradicted. Most appear in both the District Court opinion and the Court of Appeals opinion. Thus, the Court of Appeals accepted the basic specific facts found by the District Court. The Court of Appeals reversed only the *conclusion of law* reached from these facts.

ARGUMENT

1. When a thing quacks like a duck, waddles like a duck, looks like a duck, acts like a duck, and is held out by itself and others to be a duck, the conclusion is inescapable that it is a duck. Such was the case here. Under the applicable law, the undisputed facts conclusively establish that Lewis was Bradley's employee. Bradley held Lewis out as its employee—to its insurers; for federal income taxes; for state income taxes; for unemployment benefits; for workmen's compensation benefits; for social security benefits. Neither the District Court nor Bradley challenge these facts.

—and neither the District Court nor Bradley can change the conclusion required by law from these facts.

The Internal Revenue Service Regulations are most specific. In reporting "employees" for withholding tax purposes, and thus as a deductible expense, Bradley represented it was the common law employer of Lewis.

> "Reg. Sec. 31.3401 (c)-1 (TD 6259, filed 10-25-57; republished in TD 6516, filed 12-19-60.) *Employee* (a) The term 'employee' includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee . . . "(b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the results to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done . . ."
>
> (Vol. 1, Prentice-Hall, Federal Taxes, 34,658, p. 34,569) See also definition of "employee" for State income taxes, North Carolina General Statutes 105-163.1(4).

Similarly, Bradley, as a matter of law, must be held to have recognized the applicable sections of the Workmen's Compensation Act of North Carolina (G.S. 97-1, et seq.) and numerous decisions construing the act. North Carolina General Statutes 97-2 defines employee as:

> "The term 'employee' means every person engaged in an employment under any appointment or con-

tract of hire or apprenticeship, express or implied, oral or written, . . . but excluding persons whose employment is . . . not in the course of the trade, business, profession, or occupation of his employer . . . ."

A landmark decision in North Carolina Workmen's Compensation law was *Hayes v. Elon College*, 224 N. C. 11, 29 S. E. 2d [illegible]. It states:

> "By express terms the Act applies only where the employer-employee relationship exists. Sec. 8081 (i), Michie's N. C. Code of 1939; G. S., 97-2; *Winslow v. Carolina Conference Association*, 211 N. C. [illegible], [illegible] S. E. [illegible]; *Lee v. American Enka Corp.*, 212 N. C. [illegible], 193 S. E. 809.
>
> "Except as to public officers the definition of 'employee' contained in the Act adds nothing to the common law meaning of the term. Nor does it encroach upon or limit the common law meaning of 'independent contractor.' *Bryson v. Lumber Co.*, *supra*, 202 N. C. [illegible], 164 S. E. 276); *Beach v. Mickam*, *supra*, 214 N. C. 521, 14 S. E. 2d 515). The Act includes only the one and thus excludes the other. Expressio *unius exclusio alterius*.
>
> "Hence, in judicially determining the preliminary question of coverage the terms 'employee' and 'independent contractor' must be given their natural and ordinary meaning and effect. It must be presumed, nothing else appearing, that they are used in their accepted legal sense . . . ." (citations omitted)

It is, therefore, obvious that if Lewis had been injured in the very accident here involved, Bradley would have been liable as employer under the Workmen's Compensa-

tion Act. In addition, Bradley, by reporting Lewis as its employee, received the benefits of the Act. Thus, North Carolina General Statutes 97-10.1 provides: "If the employee and the employer are subject to and have accepted and complied . . . (with Workmen's Compensation Act) . . . then the rights and remedies herein granted . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise . . ." So, when the District Court concluded that the arrangement "was in the nature of an accommodation" for Lewis and Ronnie Grindstaff, it erred in failing to take into account that Bradley—as a matter of law—was receiving the protective benefits conferred by North Carolina General Statutes 97-10.1. Bradley cannot be held an employer for benefits (i.e., protection against tort actions by Lewis), but not an employer as to burdens (vicarious liability for torts of Lewis).

Bradley also, as noted by the District Court and the Court of Appeals opinions, reported Lewis as its employee for unemployment insurance and benefits under Chapter 96, Employment Security, General Statutes of North Carolina. In so doing, it represented that Lewis was an "employee" in Bradley's "employment." The law is specific: (N. C. G. S. 96-8(6)a.)

> " 'Employment' means service performed . . . for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term 'employee' includes an officer of a corporation, *but such term does not include* (*i*) *any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status*

of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules . . ." (emphasis supplied)

The District Court concluded as a matter of law that an "independent contractor" status existed (District Court Opinion, A-16). In so doing, it erred as a matter of law. Bradley, as found by the District Court and the Court of Appeals, had represented that Lewis did not have ". . . the status of an independent contractor." (Cf. N. C. G. S. 96-8(6)a., above)

Each of the federal or state laws cited above has penalty sections, imposing fines and criminal penalties for misrepresentations and violations. (26 U.S.C. 7206, 26 U. S. C. 7207; State Income Taxes: G. S. 105-163.13; Workmen's Compensation: G. S. 97-92(e), 97-94; Unemployment Insurance: G. S. 96-18) The District Court found that Bradley represented and accepted Lewis as its "employee" for federal and state tax benefits, for workmen's compensation benefits and unemployment benefits. Having made such findings, would not the District Court's conclusion of law that Lewis—instead of being an employee as represented by Bradley—was an independent contractor, subject Bradley and its officers to criminal penalties? That being so, it was error for the District Court to ignore the plain thrust and effect of the law to reach its conclusion as to the independent contractor's status. To so conclude would be to hold that Bradley's solemn representations, under penalty of fine and imprisonment, were false and fraudulent. Violation of law is never presumed.

In so concluding, the District Court looked to its assumption that Bradley's motives in representing that Lewis and Ronnie Grindstaff were employees "was in the nature of an accommodation." (District Court Opinion, A-16)

But the various federal and state laws invoked by Bradley do not provide for an "accommodation." They provide for legal consequences of elections voluntarily made.

Motivation for an act cannot change the legal consequences of an act. The District Court was correct in finding that: "Because of the records made . . . (by Bradley) . . . it appears on paper that Ronnie and Lewis were both employees of Bradley." (District Court Opinion, A-16) It erred in upsetting its own correct finding of fact by permitting motivation to change fact. One's sole motive in employing his shiftless brother-in-law Marmaduke may be to get him off the living room couch. But Marmaduke is nevertheless an employee.

The law of North Carolina requires that "The officers of a corporation *shall* consist of a president, one or more vice presidents . . ." (N. C. G. S. 55-34(a)) [emphasis supplied] .It also provides:

> "N. C. G. S. Sec. 55-35. Duty of directors and officers to corporation—Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its shareholders and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions."

Neither Ronnie nor Bradley could be presumed to have violated this statutory duty, as the District Court concluded. Indeed, in North Carolina for a corporate officer to receive a salary from a corporation—while not performing any services—is recognized as fraud. *Fulton v. Talbert,* 255 N. C. 183, 120 S. E. 2d 410 (1961). As a director, also, Ronnie was held to an even higher standard of good faith. *Pittsburg Steel Corporation v. Hardware Corporation,* 175 N. C. 450, 95 S. E. 896 (1918).

Thus, under the law of North Carolina, Ronnie as a director and vice president of Bradley, must be presumed to have been acting in the course and scope of that employment and in furtherance of the interests of Bradley. To conclude otherwise would allow fraud and violation of law to form the basis for permitting Bradley to reap the benefits (tax deductions, workmen's compensation protection, unemployment benefits) of holding Ronnie out as an employee, but to avoid the burden of vicarious liability. It is a fundamentally unfair position and cannot be sustained.

The District Court correctly analyzed North Carolina law to the effect that the right to control is a determinative factor in the employer-employee relationship. But in applying that principle, it ignored the facts which the Court itself had found. In concluding that Bradley "retained no control over Lewis or Grindstaff as *individuals*" (District Court Opinion, A-17) [emphasis supplied], it missed the point that Bradley has a basic control over Lewis and Ronnie as employees, and additionally as to Ronnie in his capacities as vice president and director.

Simply put, Bradley had the right to fire them.

Bradley put them on its payroll; Bradley alone had the right to take them off. Bradley claimed Lewis and Ronnie as employees for federal and state income tax deductions; Bradley alone could disclaim them for tax purposes. Bradley claimed them as employees under Workmen's Compensation; Bradley alone had the right to disavow the protection of the Workmen's Compensation law. Bradley listed them as employees for unemployment benefits; Bradley alone had the right to change that listing. Bradley paid Lewis and Ronnie by and from its corporate payroll bank account; Bradley alone had control over that payroll and bank account. Bradley alone chose the method of delivery to its customers using Lewis' and Ronnie's ser-

vices; Bradley alone had the right to terminate such method.

This complete power of termination, i.e., the right to fire, is the single most important factor in determining an employer-employee relationship. *Cooper v. Publishing Co.*, 258 N. C. 578, 129 S. E. 2d 107 (1962); *Lassiter v. Cline*, 222 N. C. 271, 22 S. E. 2d 558 (1942); *Evans v. Lumber Co.*, 174 N. C. 31, 93 S. E. 430 (1917). Here, Bradley had

- an absolute right to terminate both as to Lewis and Ronnie; and
- carried both Lewis and Ronnie on its payrolls; and
- claimed both as employees for tax deductions; and
- paid withholding and social security on both; and
- claimed both for the protection of the Workmen's Compensation Law.

Bradley had continued to hold out both Ronnie and Lewis as its employees for many years. This trip on which the accident occurred was one of the multiple similar trips made for Bradley by Lewis prior to this accident, while claimed by Bradley as an employee. It was one more instance of the use of an employee to carry out Bradley's business.

Bradley states now, in seeking this writ, that the Court of Appeals substituted itself as the fact-finder, in violation of Federal Rule of Civil Procedure, 28 U.S.C.A., Rule 52. It misses the point that material facts are not challenged. Those facts are uncontradicted. It is the conclusion of law drawn by the District Court that was changed by the Court of Appeals.

Bradley cannot point to a single instance in the record—before this accident, before this action was started—in which it disclaimed Ronnie and Lewis as its employ-

ees. Only after the accident, after the lawsuit, did Bradley say in effect: "Well, we know that for years they've been on our payroll, been claimed as employees for tax, insurance, workmen's compensation, unemployment benefits, but after all this was just a private arrangement." But, to permit Bradley to escape vicarious liability, it is necessary to hold that this "private arrangement" supercedes the legal consequences of Bradley's multiple yearly representations as to employment made in solemn form to various governmental and private authorities. Even after the accident Bradley continued to make those solemn affirmations as to their status as employees.

Only in this lawsuit—where there are no benefits flowings from the employer-employee relationship—does Bradley disclaim Ronnie and Lewis as its employees. Surely it would be unfair to permit a corporation to claim, insist upon, and accept the benefits of its employment relation with Ronnie and Lewis, but to escape the legal consequences here of what Bradley insists upon for every other purpose. The District Court erred in allowing such a conclusion. The Court of Appeals corrected that error of law.

As noted in *Kiff v. Travelers Insurance Company*, 402 F. 2d 129 (CA 5, 1968), as against a contention that an appellate court cannot set aside a jury verdict:

> ". . . However, this limitation on our scope of review is not applicable when all that need be determined is the legal significance of undisputed facts.
>
> > " '[W]here evidence is credible, reasonable, uncontradicated and unimpeached, no question for the jury but only one of law is presented.' *American Hardward Mutual Ins. Co. v. Vick*, 5th Cir. 1959, 268 F. 2d 183; 184.

> "The record discloses that the determinative factual ingredients of Larousse's employment status are not disputed. The only question presented, then is whether these basic facts require the imposition of liability upon Harvey Crane Service and its insurer for the acts of its servant through application of the doctrine of respondeat superior. This question of law should have been decided by the court, not the jury." (402 F. 2d 131)

and as stated in 5 Moore's Federal Practice, Sec. 52.03[2], p. 2662, 2663:

> "But in reviewing the judgment, so far as questions or conclusions of law are concerned, the appellate court is not concluded in any degree by the trial court's view of the law."

Where, as here, the material facts are uncontradicted, the question of whether one is an employee or an independent contractor is one of law for the court. *Pearson v. Flooring Co.*, 247 N. C. 434, 101 S. E. 2d 301 (1958); *Beach v. McLean*, 219 N. C. 521, 14 S. E. 2d 515 (1941). That being the case, the Court of Appeals very properly reversed the conclusion of law of the District Court that there was no agency relationship between Lewis and Bradley. The Court of Appeals properly reached the legal conclusion that a principal-agent relation was present. (A-6)

2. Bradley also maintains that there was no finding that Lewis was acting within the scope of his employment for Bradley at the time of the accident. However, both the District Court and the Court of Appeals found that it was Bradley's lumber that Lewis had hauled to Lexington on the morning of the wreck. (District Court Opinion, A-14; Court of Appeals Opinion, A-4). This was well found from the evidence. It was shortly after Lewis had completed delivering a load of lumber in Lexington for Bradley Lumber

Company that the accident occurred. (Court of Appeals Opinion, A-4) Even Bradley admits, in its petition, that delivery had just been completed when the accident occurred: (Petition, page 6) The District Court and the Court of Appeals, in short hand form, found, and the uncontradicted evidence on this point shows, that the sole reason for the trip was to transact Bradley's business, with lumber whose selection and loading to comply with Bradley's customer's order had been supervised and performed by a Bradley vice president; and the movement of which, by Lewis, had been ordered by the same vice president. Lewis, at and during the trip, was listed, claimed and paid *as an employee* by Bradley. (District Court Opinion, A-15, 16; Court of Appeals Opinion, A-4, 5) Obviously, then, the trip to Lexington was, and the *necessary return trip* would have been, if the accident had not intervened, in the course and scope of Bradley's business. See *Robinson, Hudson & Blackburn v. Transportation Co.*, 214 N. C. 489, 493, 199 S. E. 727 (1938), in which the Court pointed out that a return trip was "about the master's business."

Bradley, however, attempts to maintain that Lewis deviated from the direct route home and thereby abandoned Bradley's business. (Petition, page 6) But note this: Bradley's deviation argument necessarily concedes that the return trip would have been in the course and scope of Bradley's business. If the return trip was not in Bradley's interest, then deviation would be irrelevant. Thus, to escape the consequences of that conceded "course and scope" Bradley argues that deviation from the usual route constitutes abandonment of Bradley's business. In so doing, Bradley misses the essential point. There is no reason, in law or fact, that the trip on which Lewis was engaged at the time of collision could not be a dual purpose return trip adapted partially for the partnership purposes (i.e., wheel alignment) and primarily to return to Bradley's

place of business from the delivery made for Bradley. What might be considered a "deviation" in a case of a single isolated instance of the use of a "for hire" truck certainly could not be labeled a deviation when it was part and parcel of a pattern of mutual cooperation during a continuing relationship that lasted for many years. Dual purpose would not obviate Bradley's vicarious liability.

Obviously, the trip to Lexington having been made in the course and scope of Bradley's business, the essential return trip would have been in such course and scope. It was essential to return the tractor-trailer for further use by Bradley. It was also essential to return the billing and receipt ticket signed by Bradley's customer so that Bradley could receive payment for the lumber sold. That being so, can it be seriously contended that the portion of the trip during which the accident occurred was a complete abandonment of the essential return trip required by Bradley's business? But to escape liability, Bradley must carry the burden of showing complete abandonment.

In *Kirtz v. National Paving and Contracting Co.*, 214 Md. 243, 134 A. 2d 296 (1957), one Sudbrook owned dump trucks and furnished them to defendant National on a tonnage haul price basis; her drivers took directions as to destinations from National's superintendent; on a delivery trip the accident leading to plaintiff's injuries occurred. On the point of dual employment, the Court said

> "The jury found that Ogle was the servant of Sudbrook when the accident happened. The appellant maintains that he also was the servant of National. The question therefore arises: Can a servant have two masters, not joint employers, at one and the same time? This must be answered in the affirmative. A person may be the servant of two masters, not joint employers, at one time as to one act, pro-

vided that the service to one does not involve abandonment of the service to the other. *Baur v. Calic, supra;* Rest. Agency, sec. 226; *Kimble v. Wilson,* 352 Pa. 275, 42 A. 2d 526, 531." (134 A. 2d 301)

See also *Vance Trucking Company, Inc. v. Canal Insurance Company,* 249 F. Supp. 33 (D. C. S. C. 1966), affirmed 395 F. 2d 391; *Transport Insurance Co. v. Manufacturers Casualty Insurance Company,* 226 F. Supp. 251 (E. D. Ark. 1964), affirmed 341 F. 2d 514; *Byrne v. Pennsylvania Railroad Company,* 169 F. Supp. 655 (E. D. Pa. 1958), affirmed 262 F. 2d 906; *Lindenmuth v. Steffy,* 173 Pa. Super. 309, 98 A. 2d 242 (1953); *Siidekum v. Animal Rescue League,* 353 Pa. 408, 45 A. 2d 59 (1964).

Under the uncontradicted facts here, there could be no abandonment of the scope and course of Bradley's business when the return trip was, at least, for their mutual benefit. Again, it is emphasized that Bradley's business brought about the entire trip—to Lexington and return. Where in the record are there any facts to show a complete abandonment of Bradley's business? But, as noted in the cases cited above, abandonment must be shown. The mutual interest of Bradley and the partnership on the return trip have been clearly demonstrated above. It was while Lewis was carrying out the mutual interests of Bradley and the partnership that the accident occurred.

The Sharpes submit that it is clear from its opinion that the Court of Appeals found Lewis to have been acting in the course and scope of his employment for Bradley at the time of the accident. What did the Court of Appeals say?

"It was this vehicle that collided with the Sharpes' automobile *shortly after Lewis had completed de-*

livering a load of lumber in Lexington, North Carolina for the Bradley Lumber Company." (A-4) [emphasis supplied]

"We think these facts ineluctably establish that Lewis was no less an employee of the Bradley Lumber Company than of R. K. Grindstaff & Son and that *his negligence which brought injuries to the Sharpes in imputable to both.*" (A-5) [emphasis supplied]

"But when Bradley Lumber Company's consistent treatment of Lewis as its employee is combined with Lewis' regular employment in hauling lumber for the Company, and the close relationship that existed between Ronnie Grindstaff and Bradley, *the conclusion is inescapable that a principal-agent relation was present.*" (A-6) [emphasis supplied]

"The North Carolina courts have explicitly recognized that an agent can be in the service of two principals simultaneously, provided both have a right to exercise some measure of control, and there is a common or joint participation in the work and benefit to each from its rendition. (citations omitted) *These features were present here* and the appellants are entitled to judgment against Bradley Lumber Company as well as R. K. Grindstaff & Son." (A-7) [emphasis supplied]

From these statements, there can be no doubt that the Court of Appeals found Lewis to have been acting in the course and scope of his employment for Bradley at the time of the accident. Even had the Court of Appeals not made it so clear, in the light of the uncontradicted facts, it is not necessary that the case be remanded for consideration of that issue, for those facts "ineluctably establish"

that the issue is without merit. When a contention is wholly without merit, the case need not be remanded for decision on the point. *Accardi v. Pennsylvania R. Co.*, 383 U. S. 225, 15 L. Ed. 2d 717, 86 S. Ct. 768 (1966).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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